Filed 4/8/10 P. v. Picart CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN MARK PICART, Defendant and Appellant.	2d Crim. No. B216448 (Super. Ct. No. TA 093015) (Los Angeles County)

Stephen Mark Picart appeals from the judgment following his jury trial and conviction of first degree murder of Sharon Carter and second degree murder of her fetus. (Pen. Code, §§ 187, subd. (a), 189.)[1] The jury found special circumstance and personal and intentional firearm discharge allegations to be true. (§§ 190.2, subd. (a)(3); 12022.53, subd. (d).) The court sentenced appellant to prison for life without parole, plus 65 years (life without parole for first degree murder, 15 years to life for second degree murder, and a consecutive 25-year-to-life section 12022.53, subdivision (d) enhancement for each murder). Appellant raises instructional errors and contends that there is insufficient evidence of premeditation and deliberation to support his first degree murder conviction. We affirm.

[1] All statutory references are to the Penal Code.

BACKGROUND

In 2007, Sharon and her two sons, five-year-old Amir and fourteen-year-old Marquiese, lived in an apartment. Appellant, who started dating Sharon in 2006, frequently stayed there.

Sharon's stepfather, Willie Broom, is a minister. In August 2007, appellant spoke to Broom about some text messages that Sharon sent to a "young man that she had become interested in." Broom advised appellant that "Sharon had found another person and she was moving on with her life . . . and that he should move on . . . with his life." Appellant did not want their relationship to end.

A typed letter dated August 27, 2007, bearing appellant's name and return address, and directed to Sharon's employer, states that she was having an affair with a coworker named Patrick Smith. The same letter states that Sharon was "several weeks pregnant."

In August, Sharon was upset that appellant would not return a key and a remote entry device to her. In September, she asked Broom to change the locks on her door. On September 22, 2007, Broom reminded her to get a lock.

On Sunday, September 23, 2007, when Amir got up, Sharon and appellant were in bed. Later that day, Sharon took her sons to a service at Broom's church. Appellant and his son, Jordan, also attended and sat with them. Sharon and appellant were not fighting then. Appellant took Jordan to his mother's home after the service.

Sharon and her sons went to their apartment after the service. Later that afternoon, Amir found a handwritten letter dated September 23, 2007, from appellant to Sharon. He gave it to Marquiese, who gave it to Sharon. The letter expressed appellant's love for Sharon, and said that she "tore him apart," and that he was trying to find the strength to tell her good bye.

At approximately 4:30 p.m., Sharon and her sons got ready to go to Patrick's house. Sharon sat in the driver's seat of their "SUV," with Marquiese in the front passenger seat, and Amir in the back seat, behind him. As they approached the

apartment complex's parking gate, appellant entered the SUV and sat in the back seat, behind Sharon. He and the boys exchanged greetings. Sharon looked in the rear view mirror and told appellant to get out of the car. Appellant and Sharon argued and "just started going back and forth with words . . . ." Sharon sounded angry, and kept telling appellant to get out. Appellant spoke "in a happy voice, . . . smile[d] and [said] why, or something like that," without raising his voice. He did not seem angry; he seemed the way he always did. Finally, Sharon said that she "[knew] where to take him," but did not say where that would be.

After leaving the apartment complex, Sharon drove a short distance and turned left onto Compton Boulevard. Marquiese then saw appellant shoot Sharon in the back of the head. He heard five gunshots and saw Sharon lean against the steering wheel before she fell onto the passenger seat. Marquiese did not notice the gun before appellant shot Sharon.

Appellant ran away. He returned to the SUV briefly and left again. The SUV kept moving slowly. Angel Del Villar ran from his home when he heard the SUV hitting parked cars. He helped Marquiese stop the SUV.

Later that night, after 7:00 or 8:00 p.m., appellant took two McDonald's "kid's meals" to Jordan. Jordan's mother, Kim Batiste, did not notice anything unusual about appellant that evening. Appellant also visited two of his other children at their mother's home that evening. The next morning, appellant told Batiste that he killed Sharon because she "was trying to set him up," and "he felt like his life was in danger."

Appellant turned himself in at the police station on September 24, 2007. Detectives later found a live or unfired .25 caliber cartridge, casings, and live rounds in his car. They found .25 caliber casings and a fragment of a bullet in Sharon's SUV.

Sharon died as a result of multiple gunshot wounds to the head. A wound in the center of her forehead was caused by a shot fired from within an inch away. Two other wounds, one in her right temple and another immediately behind it, were caused by shots fired from a distance of one inch to three feet away.

A fourth wound in the back of her head was fired from an indeterminate range. The fetus in Sharon's uterus died "due to maternal death."

DISCUSSION

Heat of Passion Instruction

Appellant contends that the court erred by failing to instruct the jury sua sponte that it could find him guilty of voluntary manslaughter based on heat of passion. We disagree.

A trial court must instruct on lesser included offenses that find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Ibid.*)

Appellant relies primarily on *People v. Berry* (1976) 18 Cal.3d 509, 515-516, and *People v. Brooks* (1986) 185 Cal.App.3d 687, 694-696, in arguing that the court erred by failing to give an involuntary manslaughter instruction based on heat of passion. Unlike this case, the evidence in *Berry* and *Brooks* supported such an instruction. In *Berry*, the defendant gave detailed testimony regarding a strange series of events in which the victim had "alternately taunted defendant with her involvement with [another man] and at the same time sexually excited defendant, indicating her desire to remain with him." (*People v. Berry, supra*, 18 Cal.3d at p. 513.) An expert also testified to support the claim that the defendant was provoked into killing the victim as a result of a sudden, uncontrollable rage. (*Ibid.*) In *Brooks*, just two hours before stabbing and killing the victim, the defendant ran to a car, "pulled open the car door, jumped in, and engaged in a struggle" with the victim until police officers separated them. (*People v. Brooks*, *supra*, at p. 692.)

Here, appellant and Sharon sat together at church on the day of the shooting and were not then fighting or arguing. After appellant entered Sharon's car, they were arguing or "going back and forth," as she told him to get out of the car and he asked why. He smiled, talked in a "happy voice," and acted as he always did.

There was no evidence that appellant exhibited fury, rage, or even anger, and thus no evidence that he actually, subjectively killed under the heat of passion to warrant a heat of passion voluntary manslaughter instruction. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 585.) Therefore, he cannot establish that the court erred or violated his due process rights by failing to instruct the jury on the heat of passion theory. "[D]ue process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." (*Hopper v. Evans* (1982) 456 U.S. 605, 611; *People v. Holloway* (2004) 33 Cal.4th 96, 141.)

Provocation Instructions

Appellant further argues that the court erred by failing to instruct the jury with instructions concerning provocation, and its effect upon premeditation and deliberation, including one such as CALCRIM No. 522. We disagree.

CALCRIM No. 522 provides as follows: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [¶] [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]" In *People v. Manriquez, supra,* 37 Cal.4th, pages 583 through 584, our Supreme Court explained that "'. . . [t]he provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. . . .' [Citations.]"

Appellant recognizes that he cannot challenge the trial court's failure to instruct sua sponte on the effect of provocation. Thus, he argues that trial counsel was ineffective in failing to request instructions regarding provocation and its effect upon premeditation and deliberation. We disagree.

"The burden of proving ineffective assistance of counsel is on the defendant. [Citation.]" (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) "First, the

defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) In determining whether counsel was deficient, we measure counsel's performance "against the standard of a reasonably competent attorney . . . ." (*People v. Kipp* (1998) 18 Cal.4th 349, 366; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, at p. 694.)

Appellant cites no evidence to support his argument that he was "[a]ware [Sharon] was going to visit a new boyfriend and did not want appellant with her could have been what made appellant become irrational." Marquiese testified that Sharon "never said where she was going to take him."

Appellant claims that because the jury asked guidance about what constitutes first degree murder, it could have concluded that appellant committed second degree murder because "any planning had been negated by the provocation." This claim fails because there is no evidence that Sharon's conduct was sufficiently provocative to cause an "'. . . ordinary person of average disposition to act rashly or without due deliberation and reflection.' [Citations.]" (*People v. Manriquez*, *supra*, 37 Cal.4th. at pp. 583-584.) Appellant was upset that she became involved with another man. Even if he knew she was going to see that man on September 23, shortly after appellant stayed in her home and sat with her in church, her conduct would not provoke an ordinary person of average disposition to shoot her in the head.

Because the record lacks evidence of provocation, we reject the claim that counsel erred by failing to request provocation instructions. Moreover, appellant cannot show that but for counsel's failure to do so, there is a reasonable probability that the result of the proceeding would have been different. No reasonable juror could conclude that Sharon's conduct would have provoked an ordinary person of average disposition to shoot her repeatedly in the head.

There is Sufficient Evidence of Premeditation and Deliberation

We also reject appellant's claim that there is insufficient evidence of premeditation and deliberation. He stresses that when he was with Sharon that morning and at church, no one saw him with a gun, there was no evidence he was mad at her, and that it was only after he argued with Sharon that "the shots ensued, a circumstance indicating the shooting was a product of the heat of the moment, not premeditated and deliberated."

In reviewing the sufficiency of the evidence, we draw all reasonable inferences in support of the judgment. We do not weigh the evidence or decide the credibility of witnesses. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10-12.) "'. . . [F]irst degree murder requires more than a showing of intent to kill. . . .' [Citation.]" (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.) There must be deliberation and premeditation. (*Ibid*.)

Here the jury could reasonably infer that appellant had sufficient time to reflect and that his actions were deliberate. The manner of the killing supports a finding of premeditation and deliberation. Sharon was not armed when appellant fired several shots into her head, including one in the center of her forehead that he fired from a distance of an inch or less, in circumstances showing no evidence of a struggle. "The manner of killing-multiple shotgun wounds inflicted on an unarmed and defenseless victim who posed no threat to defendant-is entirely consistent with a premeditated and deliberate murder." (*People v. Silva* (2001) 25 Cal.4th 345, 369; see also *People v. Poindexter* (2006) 144 Cal.App.4th 572, 588 ["[t]he manner of killing, while not an execution-style single shot to the head, could still support a finding of premeditation and deliberation, as defendant quickly fired three shots at the victim, with a shotgun, from a relatively close range"].) Here, the repeated shots to Sharon's head supported a finding of a cold and calculated decision to kill. (*People v. Poindexter, supra*, at p. 588.) Jurors could find that it was analogous to an execution-style slaying. (See *People v. Stewart* (2004) 33 Cal.4th 425, 495 ["killing . . . accomplished by a single execution-style shot fired from close range into the victim's

forehead, in circumstances showing no evidence of a struggle . . . [p]lainly supports a finding of premeditation and deliberation"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Eleanor J. Hunter, Judge

Superior Court County of Los Angeles

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